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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 974

LESTER KRAFT and ALVA C. KRAFT, d/b/a National Art Academy, *Petitioners,*

v.

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Honorable Justices of the said Court:

Petitioners, Lester Kraft and Alva C. Kraft, husband and wife, appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on October 24, 1966. (App. 2A)

CITATIONS TO OPINIONS BELOW

The Opinion of the United States District Court for the District of Columbia, 247 F. Supp. 21, rendered November 18, 1965 is set out beginning at page 11 of the Joint Appendix. The United States Court of Appeals for the District of Columbia Circuit did not issue an opinion in this cause.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 24, 1966. (App. 1A) The jurisdiction of this Court is invoked under TITLE 28, United States Code, § 1254(1). Respondent is the Board of Education of the District of Columbia whose members were sued in their official capacity under the provisions of RULE 25(d)(2) of the Federal Rules of Civil Procedure adopted July 19, 1961. (App. 5A)

QUESTIONS PRESENTED

Petitioners' license to confer the degree of Bachelor of Fine Arts granted December 5, 1951 was revoked by Respondent on July 27, 1964. The questions presented are:

1. Whether Respondent had jurisdiction under TITLE 29, D. C. Code § 417 to revoke Petitioners' license, which question was presented to the lower courts but not decided by either court.

2. Whether TITLE 29, D. C. Code § 415-419 empowers Respondent to adopt alleged "Standards" governing institutions licensed by it to confer degrees, which question was presented to the lower courts but not decided by either court.

3. Whether alleged "Standards" adopted by Respondent and applied to Petitioners are per se void for exceeding the requirements of TITLE 29, D. C. Code § 415 and for vagueness, which question was presented to the lower courts but not decided by either court.

4. Whether Respondent ignored Petitioners' evidence in the record, which question was presented to the lower courts but not decided by either court.

5. Whether Respondent vitiated its revocation decision by commingling investigative, prosecution and adjudicating functions, which question was presented to the lower courts but not decided by either court.

6. Whether the United States District Court for the District of Columbia correctly interpreted its scope of review authority under the 1929 Act, TITLE 29, D. C. Code § 417.

7. Whether TITLE 29, D. C. Code § 415 violates the "Due Process Clause" of the Fifth Amendment to the United States Constitution.

PROVISIONS OF THE UNITED STATES CONSTITUTION, FEDERAL STATUTE AND REGULATIONS INVOLVED

The "Due Process Clause" of the Fifth Amendment to the United States Constitution applicable to this case is printed in the Appendix at page 2A. The Federal statute involved is TITLE 29, District of Columbia Code, § 415-419, printed in the Appendix, beginning at page 2A. The regulations applied by Respondent to Petitioners are "Standards For Approving Institutions Licensed by the Board of Education" adopted October 19, 1960 and printed in the Joint Appendix at pages 19 to 23.

STATEMENT OF THE CASE

Petitioners are husband and wife who own and operate the National Art Academy, 1763 R St., N.W., Washington, D. C. Respondent is the Board of Education of the District of Columbia consisting of its individual members acting in their official capacity.

On December 5, 1951, Respondent granted to Petitioners' predecessor in interest under the name "National Art School" a license to confer the degree of Bachelor of Fine Arts. (J.A. 18) Petitioners purchased the National Art School in August, 1958 and changed its name to the National Art Academy. (J.A. 1, 8)

On October 19, 1960, Respondent adopted certain "Standards For Approving Institutions Licensed by the Board of Education". (J.A. 19) The said "Standards" were made specifically applicable to institutions licensed to confer degrees under TITLE 29, D.C. Code § 415. The preamble of the "Standards" states: "No institution shall be approved or be allowed to remain approved unless it continuously meets the standards outlined below." (J.A. 20)

On March 22, 1962, representatives of Respondent's Committee on Degree Conferring Institutions met with Petitioners to inform them of the new licensing requirements (J.A. 123) On May 8, 1962, Committee members inspected the National Art Academy. (J.A. 89, 108, 124) Thereafter the Committee met and prepared a "Report" and "Recommendations" for Respondent concerning Petitioners' National Art Academy. This "Report" was adopted by Respondent November 21, 1962. (J.A. 23) As a result, Petitioners' license was revoked effective January

16, 1963 unless Petitioners requested a hearing provided by TITLE 29, D. C. Code § 417. Petitioners made a timely request for a closed hearing that commenced February 25, 1963. (J.A. 67) The hearing recessed that same day to permit Committee members to meet with Petitioners. (J.A. 67)

Committee members met with Petitioner Lester Kraft on March 19, 1963 and submitted a report to Respondent on March 20, 1963 (J.A. 28) wherein the Committee stated "that Mr. Kraft has taken steps to meet the recommendations in each section of the November 21, 1962 report of the Board of Education." (J.A. 29)

On July 31, 1963, Petitioners forwarded to the Committee a "mock-up" of a new catalog for the National Art Academy incorporating suggestions made by the Committee. (J.A. 126, 133)

On October 30, 1963, Committee members inspected the National Art Academy and conferred with Petitioner Lester Kraft about the catalog "mock-up" and student record forms adopted by him. (J.A. 45-66, 126) One suggested form had become displaced and was supplied Petitioners on November 4, 1963. (J.A. 46) It was immediately adopted by Petitioners. (J.A. 61)

November 20, 1963 the Committee submitted to Respondent a "Report" and "Recommendations" on the National Art Academy. (J.A. 35) Respondent adopted this "Report" revoking Petitioners' license effective December 18, 1963 subject to Petitioners' request for a resumption of the recessed hearing. (J.A. 44)

Petitioners made a timely request for resumption of the hearing. On March 19, 1964 the hearing recon-

vened with subsequent sessions on April 2nd, 10th, and 17th, 1964. (J.A. 68, 77, 105, 130)

The Committee presented witnesses and introduced exhibits during the course of the hearing. Petitioner Lester Kraft testified and placed exhibits in the record including the complete file of all students. Student records forms identical with those recommended by the Committee and adopted by Petitioners were included in the record. (J.A. 45-66) Revisions of the National Art Academy catalog incorporating changes recommended by the Committee were placed in evidence.

On May 14, 1964 and June 17, 1964, Respondent held its decision-making sessions. (J.A. 154, 163) Dr. Carl F. Hansen, Chairman of the Committee, and Mr. John M. Fletcher, a member, attended and participated in the decision-making sessions. (J.A. 162, 166, 170)

On June 17, 1964 Respondent adopted a motion approving the Committee's Report of November 20, 1963 that recommended revocation of Petitioners' license. (J.A. 165, 171) July 27, 1964 Respondent issued its "Order Of Revocation" of Petitioners' license. (J.A. 31)

On August 13, 1964, Petitioners instituted Civil Action 1997-64 in the United States District Court for the District of Columbia seeking a mandatory injunction to suspend and vacate Respondent's order revoking the license. (J.A. 1) In paragraph 19 of their Complaint, Petitioners allege seven grounds challenging Respondent's decision to revoke. (J.A. 5, 6)

Respondent's Answer was filed October 27, 1964 denying Petitioners' allegations. (J.A. 8-10) As provided by TITLE 29, D. C. Code § 417, Respondent supplied Petitioners with a transcript of the hearing and of Respondent's decision-making sessions as well.

The matter was tried before the Honorable Alexander Holtzoff on October 25 and 28, 1965. The evidence in the said Court consisted of the complete record of Respondent's hearing including written transcripts and all the exhibits. Counsel for the parties presented oral argument on October 28, 1965. On that same date the Court ruling from the bench dismissed the complaint on its merits. The Court's Order was entered November 1, 1965. (J.A. 11) An amended Opinion was filed by the Court on November 18, 1965. (J.A. 11), 247 F. Supp. 21.

The Court ruled on the "scope of review issue" (J.A. 15); the "Due Process Clause" issue under the Fifth Amendment to the Federal Constitution (J.A. 15-16); and held that there was substantial evidence to support Respondent's decision. (J.A. 16-17) The other issues presented by the pleadings and oral argument were not decided by the trial court.

On November 26, 1965, Petitioners filed a Notice of Appeal with the clerk of the trial court. (J.A. 18) The complete record was filed with the United States Court of Appeals for the District of Columbia Circuit along with briefs. Oral argument was presented to the said Court October 19, 1966. All issues framed by the pleadings were argued in the briefs and orally before the said court.

On October 24, 1966 the appellate court affirmed the trial court without an Opinion. (App. 1A) Petitioners filed a "Designation of Record" to this court with the Clerk of the United States Court of Appeals for the District of Columbia Circuit on December 29, 1966. This Petition for Writ of Certiorari was filed within the time fixed by law and the rules of this Court.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES NOT DECIDED BY EITHER LOWER COURT

1. Respondent Had No Jurisdiction Under Title 29, D. C. Code § 417 To Revoke Petitioners' License

Respondent's statutory authority to revoke a license requires it to allege violation of TITLE 29, D. C. Code § 415. (App. 3A) Respondent initiated revocation action against Petitioners solely on alleged violations of its own regulations. (J.A. 19) No violation of TITLE 29, D. C. Code § 415 is alleged by Respondent in its November 21, 1962 initial revocation order. (J.A. 23) Therefore, Respondent failed to comply with the statute and lacked jurisdiction to proceed against Petitioners.

The first sentence of Respondent's revocation order of November 21, 1962 refers to "criteria and standards" adopted by Respondent on October 19, 1960. (J.A. 23) Alleging violations of these "standards" Respondent ordered:

> "* * * 1. That the license to confer the degree of Bachelor of Fine Arts be revoked BECAUSE OF THE FAILURE * * * TO MEET REQUIRED STANDARDS AS OUTLINED ABOVE * * *." (J.A. 26) (Emphasis supplied)

TITLE 29, D. C. Code § 417 grants to Respondent revocation power only under the following circumstances:

> "* * * A license once issued may be revoked by said Board of Education for NONCOMPLIANCE * * * WITH THE PROVISIONS OF SECTION 29-415. * * *". (App. 3A) (Emphasis supplied)

Nowhere in its revocation order of November 21, 1962 (J.A. 23) does Respondent allege the indispens-

able prerequisite to its revocation jurisdiction, namely, violation of TITLE 29, D. C. Code § 415.

VOLUME 33, AMERICAN JURISPRUDENCE, "Licenses", § 66, P. 382 states:

> "* * * Where a statute or ordinance authorizes the revocation of a license for CAUSES ENUMERATED such license CANNOT BE REVOKED ON ANY GROUND OTHER THAN THE CAUSES SPECIFIED. * * *" (Emphasis supplied)

Respondent sought to cure the jurisdictional defect by careful drafting of its decision on July 27, 1964. (J.A. 31) Its theory appears to be that an invalid exercise of power by a Federal Government Agency can be cured by the selection of certain words in its final decision. Stated otherwise, Respondent contends that it is empowered to grant itself jurisdiction retroactively by prudent word selection in a decision issuing from a hearing held in violation of TITLE 29, D. C. Code § 417. This proposition inverts long standing administrative law principles. Only rigid procedural compliance with the governing statute validates an agency decision. No court decision has been found that holds an administrative agency may retroactively grant itself jurisdiction taken in violation of the statute.

Petitioners asserted this issue in paragraph 19 of their Complaint in these words:

> "* * * 19 a. The defendant Board has no jurisdiction in the matter. * * *" (J.A. 5)

Respondent denied this allegation in its Answer as follows:

> "* * * 19 and 20. The defendant denies all matters, conclusions and allegations contained in

paragraphs numbered 19 and 20 of the complaint. * * * (J.A. 10)

The trial court's Opinion filed November 18, 1965 makes no mention of this issue. (J.A. 11-17) The appellate court affirmed without opinion after the issue was presented and argued before it. Therefore this issue remains undecided by either lower court.

2. Respondent Usurped Power Not Granted by Congress to Promulgate "Standards" Governing Institutions Licensed to Confer Degrees Under Title 29, D. C. Code §§ 415-419

TITLE 29, D. C. Code § 415-419 (App. 2a) vests no power in Respondent to promulgate regulations purportedly violated by Petitioners and therefore the so-called "Standards" (J.A. 19) are invalid. Respondent's revocation proceeding initiated November 21, 1962 (J.A. 23) on the basis of alleged violation of void "Standards" had no legal efficacy. Respondents' revocation decision of July 27, 1964 (J.A. 31) is accordingly null and void.

TITLE 29, D. C. Code, "Corporations; Chapter 4, Institutions Of Learning", § 414-419 (App. 2A) was approved March 2, 1929. Prior to this enactment, Respondent had no authority over such institutions. The statute contains no language vesting power in Respondent to promulgate regulations governing institutions licensed pursuant to its terms.

Respondent's counsel admitted that the Board did not have authority to promulgate regulations but asserted the "Standards" are only "guide lines" for Respondent. (J.A. 71) This position is positively contradicted by the "Standards" which speak in mandatory words:

> " * * * No institution SHALL be approved or BE ALLOWED TO REMAIN APPROVED UNLESS IT CON-

TINUOUSLY MEETS the standards outlined below. * * * (J.A. 20) (Emphasis supplied)

Respondent's agent, Fletcher, asserted to Petitioners that the "Standards" are "new licensing requirements" applicable to them. (J.A. 124) Moreover, when Respondent initiated action against Petitioners on November 21, 1962 (J.A. 23) it clearly indicated that the "Standards" were regulatory in nature and alleged violations of same as grounds for seeking revocation of Petitioners' license.

The United States District Court for the District of Columbia in *Jones* v. *District of Columbia,* 212 F. Supp. 438, (1962); affirmed 323 F. 2nd 306 (1963), states at page 441:

> "* * * it should be noted that the Congress has exclusive jurisdiction over the District of Columbia and the Commissioners being mere agents of the Congress *have only such authority to promulgate regulations as the Congress has specifically vested in them in any given field.* * * *" (Emphasis suppiled)

The general principle applicable to agency regulations was set out by the United States Court of Appeals, Eighth Circuit in *Review Committee Venue VII, etc.* v. *Willey,* 275 F. 2nd 264 at page 272 as follows:

> "* * * *Regulations,* however, cannot be arbitrary. They *must have a basis in the statute and be within the authority granted the Administrative Agency.* Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 64 S. Ct. 1215, 88 L. Ed. 1488; Social Security Board v. Nierotko, 327 U.S. 258, 66 S. Ct. 637, 90 L. Ed. 718; Morrill v. Jones, 106 U.S. 466, 1 S. Ct. 423, 27 L. Ed. 267. * * *" (Emphasis supplied)

Earlier in *Gardner* v. *United States*, 239 F. 2d 234, (1956) the United States Court of Appeals, Fifth Circuit stated at page 237:

> "* * * a *Regulation* issued by an administrative official *under the direct authority of the statute* may not be found invalid for inconsistency unless the variance is so clear that it is manifest that the court has no choice except to hold that the administrator has exceeded his authority and employed means that are not appropriate to the end specified in the act. Boske v. Comingore, 177 U.S. 459, 20 S. Ct. 701, 44 L. Ed. 846; Fussell v. United States, 5 Cir., 100 F. 2nd 995. * * *" (Emphasis supplied)

In the cases cited, Congress had expressly granted regulatory power to the agency. Here there was no such power grant to Respondent.

Nor does Respondent possess under TITLE 29, D. C. Code § 415-419 (App. 2A) and "implied power" to promulgate the "Standards". (J.A. 19) This principle was stated in *Gardner* v. *Ewing*, 88 F. Supp. 315, (1950) as follows at page 322:

> "* * * *Authority to promulgate* a regulation in derogation of the common law *will not be implied.* Implied authority in an administrative agency to extend or modify a law may not be inferred from the grant of authority to enforce it * * *." (Emphasis supplied)

When Congress has intended that Respondent possess regulatory power it has expressly vested such authority as indicated by the eight separate grants of such power in TITLE 31, D. C. Code, "Education and Cultural Institutions, §§ 204, 209, 633, 660, 691, 694, 697 and 1402.

Petitioners contend that since Respondent possesses no express or implied power to promulgate the October

19, 1960 "Standards" (J.A. 19), the initiation of revocation action on November 21, 1962 constituted a usurpation of power that rendered the proceeding and revocation decision of July 27, 1964 null and void.

This issue was asserted by Petitioners in paragraph 19 of their Complaint as follows:

> "* * * 19 c. The alleged standards and criteria adopted by the defendant Board on October 19, 1960 are invalid since Congress did not empower the defendant Board to make rules and regulations concerning degree conferring institutions licensed under TITLE 29, D.C. Code, § 415-419. * * * (J.A. 5).

Respondent denied this allegation in paragraph 19 of its Answer. (J.A. 10) The trial court's Opinion filed November 18, 1965 makes no mention of this issue. (J.A. 11-17) The appellate court affirmed without opinion after the issue was presented and argued before it. Therefore this issue remains undecided by either lower court.

3. Respondent's October 19, 1960 "Standards" Are Void for Exceeding the Requirements of Title 29, D. C. Code § 415 and for Vagueness

Even if it is assumed that Respondent had power to promulgate regulations, the "Standards" (J.A. 19) are void for exceeding the requirements of TITLE 29, D. C. Code § 415 (App. 2A) and are invalid on the further ground of vagueness.

TITLE 29, D. C. Code § 415 establishes the following four requirements to qualify an institution to receive and retain the license (J.A. 18) granted by Respondent to Petitioners:

> "* * * 1. That in the case of an individual or any unincorporated group of individuals he, or

a majority of them, or in the case of an incorporated institution, a majority of the trustees, directors, or managers of said institution are persons of good repute and qualified to conduct an institution of learning.

"2. That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree: PROVIDED, That if more than one-half the requirements for any degree are earned by correspondence or extra-mural study, such fact shall be conspicuously noted upon the diploma conferred: PROVIDED FURTHER, That no diploma shall be issued conferring a degree in medicine or any healing art, or in dentistry, for study pursued or work done by correspondence.

"3. That applicants for said degree possess the usual high-school qualifications at the time of their candidacy therefor.

"4. That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment." (App. 2A, 3A)

Respondent in promulgating the October 19, 1960 "Standards" (J.A. 19-23) established eight requirements for a licensee such as Petitioners to retain such license; namely, Objectives, Curriculum, Admission Policies; Faculty; Library, Student Personnel Services; Building and Equipment; and Financial Relations with Students. Moreover, a licensee must "continuously" meet these requirements "to remain approved". (J.A. 20)

Of these eight "Standards" the following exceed the requirements of TITLE 29, D. C. Code § 415 by demanding that the licensed institution:

1. State "Objectives" in a catalog.
2. State admission requirements in a catalog.
3. Establish Student Personnel Services.
4. State financial relations policy in a catalog.

However intrinsically meritorious these requirements are as expressions of modern educational policy they are, nevertheless, not required by the 1929 Act. Nor were they required on December 5, 1951 when Respondent granted the license in dispute in this matter. This was clearly stated by Respondent itself in Petitioners' license as follows:

> "* * * Caution.—The granting of this license must not be construed or advertised as an accrediting of the institution so licensed or as an approval of its educational standards or methods, or otherwise than as A DETERMINATION BY THE BOARD OF EDUCATION THAT IT IS A BONA FIDE INSTITUTION AND THAT IT SUBSTANTIALLY SATISFIES THE REQUIREMENTS OF THE ACT OF MARCH 2, 1929." (J.A. 19) (Emphasis supplied)

From December 5, 1951 to October 19, 1960, nearly nine years, Respondent considered Petitioners in *substantial compliance* with TITLE 29, D. C. Code § 415. Not until Respondent established its new criteria and "Standards" on October 19, 1960 (J.A. 19) did any question arise involving Petitioner's right to retain its license. Then on November 21, 1962 (J.A. 23) Respondent initiated revocation action against Petitioners *not* for allegedly violating "the requirements of the Act of March 2, 1929" (J.A. 19) but for allegedly vio-

lating the four requirements of its October 19, 1960 "Standards" that exceed the requirements of the statute. (J.A. 24, 25)

In *Gardner* v. *Ewing,* 88 F. Supp. 315 (1950), the Court stated at page 322:

> "* * * *Regulations* issued by a governmental agency to which the administration of a statute is committee *may not expand or extend the provisions of the statute or add to the conditions of a right, a condition not stated therein.* * * *" (Emphasis supplied)

To similar effect is Volume 1, AMERICAN JURISPRUDENCE 2nd, "Administrative Law", § 132, Page 944:

> "* * * The rule-making power is not power to remedy legislative oversight consisting of claimed omissions from the statute. * * *"

The following "Standards" establish requirements so vague and imprecise in their wording, they are invalid:

a. Curriculum . . . "in accordance with sound educational principles" (J.A. 21)

b. Faculty . . . "insure instruction of the highest quality". (J.A. 22)

c. Library . . . "shall be adequate". (J.A. 22)

d. Building and Equipment . . . "Appropriate" space and equipment shall be provided" (J.A. 22)

e. Financial Relations with Students . . . "financial status of the institution must be such" (J.A. 22)

These "Standards" are not defined. No clear, understandable, objective measure was set out by Re-

spondent whereby Petitioners and others similarly situated could determine whether they "continuously" meet the "new requirements". This vagueness of the "Standards" subjects Petitioners and other licensees similarly situated to shifts in attitudes of incumbent members of the Respondent Board as well as to new interpretations when changes are made in Respondent's membership.

Volume 1, AMERICAN JURISPRUDENCE, "Administrative Law", § 133, P. 946 states:

> "* * * The rule-making power of an administrative agency is, of course, as much subject to the limitations of the federal and state constitutions as the legislative body which creates it. * * *"

and Ibid, § 117, at page 923:

> "* * * Such STANDARDS, in conferring discretionary power upon an administrative agency, must be REASONABLY ADEQUATE, SUFFICIENT, and DEFINITE for the guidance of the agency in the exercise of the power conferred upon it and MUST ALSO BE SUFFICIENT TO ENABLE THOSE AFFECTED TO KNOW THEIR RIGHTS AND OBLIGATIONS. * * *" (Emphasis supplied)

Petitioners contend that the October 19, 1960 "Standards" (J.A. 19) upon which Respondent based its revocation action are null and void for exceeding the requirements of the statute and for inherent vagueness. They asserted this issue in paragraph 19 of their Complaint as follows:

> "* * * 19 * * * d. The alleged standards and criteria applied by the defendant Board to the National Art Academy are void for vagueness and invalid on the further ground that they constitute an attempt by the defendant Board to legislate beyond

> the confines of the organic act by establishing requirements for the National Art Academy that are not set forth in TITLE 29, D. C. Code § 415. * * *" (J.A. 6)

Respondent denied this allegation in paragraph 19 of its Answer. (J.A. 10). The trial court's Opinion filed November 18, 1965 makes no mention of this issue. (J.A. 11-17) The appellate court affirmed without opinion after the issue was presented and argued before it. Therefore, this issue remains undecided by either lower court.

4. Respondent Ignored Petitioners' Evidence of Compliance With Title 29, D. C. Code § 415

The revocation decision of July 27, 1964 (J.A. 31) is of no force and effect since Respondent in reaching that decision merely adopted its Committee report of November 20, 1963 (J.A. 35) and ignored Petitioners' proof of statutory compliance placed in the hearing record April 17, 1964. (J.A. 45-66, 132-154)

Respondent's administrative hearing commencing February 25, 1963 (J.A. 67) was recessed until March 19, 1964. (J.A. 68) Further sessions were held in April, 1964 on the 2nd (J.A. 77); 10th (J.A. 105); and 17th (J.A. 130), Respondent's decision-making sessions were held on May 14th, 1964 (J.A. 154) and on June 17th, 1964 (J.A. 163).

The following colloquy in the executive session of June 17th reveals that Respondent's decision consisted of nothing more than the adoption of its Committee's report of November 20, 1963:

> "DR. MCLENDON: Then the question is—let me clarify myself. The question is then that we should accept the Superintendents' recommendation as of

November 20, 1963 and so state that in your decision.

"MR. WILLIAMS: That is right. * * *

"DR. MCLENDON: That their school did not meet our requirements as of November 20, 1963.

"MR. WILLIAMS: That is right. * * * (J.A. 165)

* * *

"DR. MCLENDON: I still have this reservation, that the Board allowed testimony to be presented at the time this hearing was held which was showing an improvement over the action or disposing of the action of the Board on November 20, 1963. We allowed that evidence to come before us.

"MR. WILLIAMS: That is all right. * * *" (J.A. 170)

On April 17, 1964, Petitioners placed into evidence proof of compliance with the statute. (J.A. 45-66, 132-154) The transcripts of Respondent's executive sessions nowhere reveal any studied sifting of the evidence nor any evaluation of the proof offered by Petitioners. (J.A. 154-171) Instead Respondent merely adopted the November 20, 1963 Committee report prepared five months before Petitioners placed their evidence in the record. This Committee report (J.A. 35) was in essence a progress report during the recess of the hearing that opened on February 25, 1963 (J.A. 67) and resumed on March 19, 1964, (J.A. 68) four months after the said Committee report was submitted to Respondent.

TITLE 29, D.C. Code § 417 safeguards the licensee's rights from arbitrary action by Respondent by compelling:

"* * * THE EVIDENCE UPON WHICH SAID BOARD SHALL ACT in the revocation of such license shall

be committed to writing under the direction of the board, * * *" (App.) (Emphasis supplied)

Respondent's executive sessions transcripts disclose that the "evidence" upon which it acted to revoke Petitioners' license consisted of the November 20, 1963 self-serving Report of the Committee on Degree Conferring Institutions. The mandate of the statute is that Respondent "shall act" on the evidence in the record in a revocation proceeding. This Respondent did not do.

In *Morgan* v. *United States,* 298 U.S. 468, 80 L. Ed. 1288, 56 S. Ct. 906 this Court stated at page 912:

> "* * * For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption *that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence* * * *". (Emphasis supplied)

Such conscientious addressing to the evidence was not done by Respondent in this matter. Thus, Respondent failed to comply with the basic requirement of the Constitution and of the TITLE 29, D. C. Code § 417.

Petitioners contend that they proved substantial compilance with the requirements of the statute and that Respondent in reaching its revocation decision ignored this proof.

This issue is asserted in paragraph 19 of Petitioners' Complaint as follows:

> "* * * 19 * * * e. At the hearing, plaintiffs proved substantial compliance with the statutory

requirements set forth in TITLE 29, D. C. Code § 415, all of the plaintiff's evidence being contained in the record of the hearing. * * *" (J.A. 6)

Respondent denied this allegation in paragraph 19 of its Answer. (J.A. 10) The trial court's Opinion filed November 18, 1965 makes no mention of this issue. (J.A. 11-17) The appellate court affirmed without opinion after the issue was presented and argued before it. Therefore, this issue remains undecided by either lower court.

5. Respondent Vitiated Its Revocation Decision by Commingling Its Investigative, Prosecution and Adjudicating Functions

Assuming that the proceeding against Petitioners initiated on November 21, 1962 (J.A. 23) was in compliance with TITLE 29, D. C. Code § 415 and § 417; assuming that Respondent possesses power to promulgate the October 19, 1960 "Standards" (J.A. 19); assuming the said "Standards" are inherently valid; and assuming that the revocation decision of July 27, 1964 (J.A. 31) is based upon substantial evidence in the record; nevertheless, Respondent vitiated, nullified, and voided the revocation decision by commingling its investigative, prosecution and decision-making functions.

Respondent's Committee On Degree Conferring Institutions investigated Petitioners' National Art Academy and submitted the November 21, 1962 (J.A. 23) and November 20, 1963 (J.A. 35) reports and recommendations. Chairman of the Committee was Dr. Carl F. Hansen. (J.A. 27, 44) The Committee prosecuted the action against Petitioners at the hearing held by

Respondent as described by Corporation Counsel on March 19, 1964:

> "* * * it is my feeling that the Committee's case, which is being heard by the Board of Education, should be presented first. * * *" (J.A. 70)

Two Committee members testified at the hearing; namely, John Milton Fletcher (J.A. 27, 44, 105) and Wendall W. Cruze (J.A. 44, 94).

Dr. Hansen and Mr. Fletcher both attended Respondent's decision-making sessions held on May 14th and June 17th, 1964. Each argued against Petitioners to persuade Respondent to approve the Committee's revocation recommendation. (J.A. 161-163, 166, 168-171) Respondent adopted the Committee's interim progress report of November 20, 1963 as the basis for its revocation decision. (J.A. 165, 170)

Dr. Hansen argued in part as follows:

> "DR. HANSEN: * * * I think there has been nothing offered to suggest that they anywhere come close to the degree-conferring qualifications as normally expected, as you said the other day, Dr. Johnson. * * *" (J.A. 166)
>
> "DR. HANSEN: If we were to bring in a report recommending that an institution like this be given a license, you'd laugh us out of the room. * * *" (J.A. 170)
>
> "DR. HANSEN: They have a lack of curriculum, lack of records, inadequacy of staff, total inadequacy of library for any kind of public institution of higher learning, facilities questionable, admission standards questionable, highly questionable on every count. * * *" (J. A. 170)

In presenting his argument ex parte to Respondent, Dr. Hansen at no time referred to the requirements of

TITLE 29, D. C. Code, § 415. His statements consisted of subjective viewpoints, self-serving in nature, to support the Committee's interim report. And Dr. Hansen did not remind Respondent that on March 20, 1963 the Committee had reported:

> "* * * that Mr. Kraft has taken steps to MEET THE RECOMMENDATION IN EACH SECTION OF THE NOVEMBER 21, 1962 report of the Board of Education * * *." (J.A. 29) (Emphasis supplied)

Dr. Hansen not only derided Petitioners' proof of adoption of each recommendation made by the Committee in its two reports, but in final analysis the Committee Chairman impugned the recommendations of his Committee. This forceful participation by Dr. Hansen and Mr. Fletcher in the decision-making sessions of the Respondent is a classical example of the unfair practice outlawed by the Administrative Procedure Act, TITLE 5, U.S. Code § 1004.

The separation of function principles set out in the Administrative Procedure Act has been the law of the land for over twenty years. Dr. Hansen was the chief investigator of Petitioners. He was the prosecutor at the hearing. At the decision-making sessions, he was the principal advocate for revocation. Respondent is not expressly subject to the terms of the Administrative Procedure Act. Nevertheless, Respondent should be held subject to the principles of fair play enunciated and enforced under the terms of that law.

Petitioners presented this issue to the trial court. Respondent's counsel in oral argument disputed Petitioners' contention.

The trial court's Opinion filed November 18, 1965 makes no mention of this issue. (J.A. 11-17) The

appellate court affirmed without opinion after the issue was presented and argued before it. Therefore, this issue remains undecided by either lower court.

II. THE ISSUES DECIDED BY THE LOWER COURTS.

6. The United States District Court for the District of Columbia Erred in Holding That Its Scope of Review Under Title 29, D. C. Code § 417 Precluded an Independent Judgment of the Facts by Such Court

The trial court erred in refusing to exercise an independent judgment on the facts as authorized by TITLE 29, D. C. Code § 417. (App. 3A) It limited itself solely to determining whether there is evidence in the record to support the revocation decision. (J.A. 15)

TITLE 29, D. C. Code § 417 provides:

> "* * * That any party aggrieved by the action of said board in * * * revoking a license previously granted may have the action of the said Board of Education reviewed by the District Court of the United States for the District of Columbia at an equity term thereof. * * *" (App. 4A)

At the trial Petitioners pointed out that the 1929 law did not make Respondent's findings "conclusive" and requested the court to exercise its own independent judgment of the facts and not limit itself to the "substantial evidence" test. That court held:

> "* * * The Court may not review the weight of evidence, however, and reach an independent conclusion on the basis of the evidence presented at the hearing before the Board. * * *" (J.A. 15)

On appeal Petitioners contended that Rule 52 (a) of the Federal Rules of Civil Procedure (App. 5A) empowers the appellate court to substitute its own judgment on the facts since "non-demeanor" evidence

only was presented to the trial court. This same principle empowers the trial court to exercise its own judgment on the facts, on the appeal from Respondent's decision. Petitioners argued that the application of Rule 52 (a) to this case consisting only of documentary evidence and no "demeanor" evidence should be according to the interpretation of the Rule by Judge Frank in *Orvis* v. *Higgins,* 180 F. 2nd 537; cert. denied 340 U.S. 810, 71 S. Ct. 36, 95 L. Ed. 595. There Judge Frank applied the principles of *United States.* v. *United States Gypsum Co.,* 333 U.S. 364, 394-396, 68 S. Ct. 525, 542, 92 L. Ed. 746 as follows:

> P. 539: "* * * The Court pointed out that a trial judge's finding does not have the dignity which jury verdicts derive from the Constitution nor the *dignity* which *some statutes confer on findings of some* administrative agencies * * *."
>
> P. 542: "* * * Since the judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this court may reverse findings of fact by a trial court here 'clearly erroneous' * * *." (Emphasis supplied)

This "dignity" of finality Congress conferred on the findings of some administrative agencies is defined in legislative language that such findings "if supported by evidence, shall be conclusive." TITLE 29, D. C. Code § 417 does not contain language making Respondent's findings "conclusive".

Therefore, the scope of review test applicable by both lower courts on appeal from Respondent's decision is that Judge Frank stated in *Orris* v. *Higgins,* 180 F. 2nd 537 at page 539:

> "* * * Where a trial judge sits without a jury, *the rule varies with the character of the evidence*:

> * * * (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts then *we may ignore the trial judge's finding and substitute our own* (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremenly doubtful, or (2) *if the trial judge's finding must rest exclusively on the written evidence* or the undisputed facts, so that his evaluation of credibility has no significance * * *." (Emphasis supplied)

The only evidence in this case before the trial judge consisted of the transcript of testimony and the exhibits. Since the statute here involved does not make Respondent's findings "conclusive" both lower courts under Rule 52 (a), F.R.C.P. were empowered to substitute independent judgments on the facts.

This conclusion is supported in Volume 5, MOORE'S FEDERAL PRACTICE, § 52.02 at page 2607:

> "* * * In EQUITY CASES THE FINDINGS OF FACT were REVIEWABLE BOTH as to the WEIGHT of the supporting evidence and the SUFFICIENCY; the review was both of fact and law. * * * RULE 52 is based on and SUBSTANTIALLY CARRIES FORWARD THE PROVISION OF EQUITY 70½ and the former equity practice. * * *" (Emphasis supplied)

Petitioners submit that the trial court erred in refusing to exercise an independent judgment on the facts. The appellate court affirmed without opinion.

7. Title 29, D. C. Code § 415 Violates the "Due Process Clause" of the Fifth Amendment to the United States Constitution

In granting licensing power to Respondent by TITLE 29, D. C. Code § 415 (App.), Congress invested discretionary authority in Respondent to require or forego evidence of statutory compliance from any or

every license applicant. This broad permissive power derives from Congressional use of the words "may require" in the terms of the grant. This delegation of broad discretion in the District of Columbia agency violates the "due process clause" of the Fifth Amendment to the United States Constitution.

TITLE 29, D. C. Code § 415 provides in pertinent part as follows:

> "* * * the Board of Education of the District of Columbia, which before granting any such license MAY REQUIRE SATISFACTORY EVIDENCE * * *" (App. 2A) (Emphasis supplied)

This word "may" appears in the same sentence with the word "shall" in TITLE 29, D. C. Code § 415.

The United States Court of Appeals for the District of Columbia in *Brown* v. *Hecht Co.*, 78 App. D. C. 98, 137 F. 2nd 689 reversed on other grounds, 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754, stated at page 693:

> "* * * It is recognized that the use of 'may' and 'shall' in one sentence implies that each word is used in its own ordinary sense and not in the sense of the other. * * *"

In *Holzendorf* v. *Hay*, 20 App. D.C. 576, the same court at page 579 held where "may" and "shall" appeared in the same sentence:

> "* * * we are of the opinion that the word 'may' was used therein in its permissive sense. * * *"

Volume 33, AMERICAN JURISPRUDENCE, "Licenses", § 60, page 377 states:

> "* * * The general rule is that ARBITRARY POWER TO GRANT OR WITHHOLD LICENSES CANNOT BE CONFERRED upon a board or official. The generally ac-

> cepted principle is that license legislation which vests in public officials discretion to grant or refuse a license to carry on an ordinary lawful business, profession, or activity without prescribing definite rules and conditions for the guidance of the officials in the execution of their discretionary power is invalid. * * *"

Volume 1, AMERICAN JURISPRUDENCE 2nd, "Administrative Law", § 114, Page 916 states:

> "* * * A statute or ordinance which vests an arbitrary discretion in administrative agencies with reference to the rights or property of individuals or an ordinarily lawful business or occupation without prescribing a UNIFORM RULE OF ACTION, making the enjoyment of such rights depend upon ARBITRARY CHOICE of the AGENCY WITHOUT REFERENCE TO ALL PERSONS OF THE CLASS TO WHICH THE STATUTE OR ORDINANCE IS INTENDED TO BE APPLICABLE, and without furnishing any definite standard for the control of the agency, Is UNCONSTITUTIONAL AND VOID. * * *" (Emphasis supplied)

Petitioners contend that TITLE 29, D. C. Code § 415 violates the "Due Process Clause" of the Fifth Amendment to the Federal Constitution since it grants to Respondent powers to decide which applicant for a license must and which applicant need not produce "satisfactory eviednce" of compliance with the statute's four requirements for a license. Respondent thus has power to require "evidence" from one applicant and at the same time grant a license to another applicant without requiring any evidence of statutory compliance.

In paragraph 19 of their Complaint, Petitioners asserted:

> "* * * 19 * * * b. The delegation in TITLE 29, D. C. Code § 415 and § 416 by Congress to the Board of Education of the District of Columbia to license institutions to confer degrees is invalid since it grants an arbitrary power to the defendant Board." (J.A. 5)

Respondent's Answer in paragraph 19 denies this allegation. (J.A. 10)

The trial court in its Opinion filed November 18, 1965 held that:

> "* * * This Court construes the word 'may' as having a mandatory significance and not as conferring upon the Board the choice whether to require proof or not before granting a license. The Court holds that it is incumbent and mandatory upon the Board to require the submission of evidence to show that the requirements of the statute are met. * * *" (J.A. 16)

The appellate court affirmed without opinion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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